36.95 1/20/70

Second Supplement to Memorandum 69-138

Subject: Study 36.95 - Condemnation (Constitutional Revision)

The Committee on Article I of the Constitution Revision Commission is reconsidering the phrasing of the last sentence of its recommendation on Section 14. This recommendation is set out in the first portion of the First Supplement to Memorandum 69-138. The Committee appears to be unwilling to recommend any change in the jury trial requirement of Section 14. In this connection, the Law Revision Commission received the letter set out as Exhibit I to this memorandum. I provided the Committee of the Constitution Revision Commission with a copy of the letter, but the letter did not appear to have any effect on the Committee's decision not to change the existing provision on the right to a jury trial in an eminent domain case.

The staff has given considerable thought to the last sentence of revised Section 14 and suggests that this section be revised to read:

> This money shall be available immediately to the owner subject to such reasonable conditions as the Legislature may prescribe .

The addition of the underscored phrase would permit the Legislature to require, for example, an undertaking for repayment of the portion of the amount withdrawn that exceeds the amount of the final judgment.

If the Constitution Revision Commission is unwilling to change the last sentence, the staff believes that this matter should be brought to the attention of the legislative committee that considers this section. It is essential that the court be authorized to require an undertaking in appropriate cases; otherwise, the court will fix the deposit so low that there will be no chance that it will exceed the amount of the final judgment.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

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January 7, 1970

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Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

Please refer to your letter of December 9, 1969, transmitting a preliminary outline of your study relating to procedural aspects of condemnation law.

Since much of my legal work during the past 6 years has been devoted to the condemnation of property for highway and flood control purposes, it appears that this would be a propitious time to express my views regarding item IV.1.a. "Right to Jury Trial." In the overall scheme and result of the condemnation procedure, the manner in which value is determined is the heart of it, and should be afforded a correlative priority in this study.

Of the approximately 15 jury cases that I have tried, the one common characteristic underlying determination of value in all of them has been that of randomness; the outside limits of such determination being condemner's lowest appraisal and condemnee's highest.

The usual conditions of trial finds the jury completely without knowledge of real estate values - this condition being assured by the systematic exclusion by both condemnor and condemnee of any prospective juror evidencing any more contact with real estate than the purchase of his home. In discussing cases with jurors after verdict, I am frequently puzzled at the appraisal methods adopted by the jury. Although evidence of value is limited under Evidence Code Section 813 to opinions of experts or owner, it is clear that these lay jurors have instead sifted through a mass of technical data accumulated in five to ten days of testimony, and have selected a few bits of the data to apply in a formula or part of a formula poorly understood - in an attempt to appraise the property. The post verdict statement is often made by jurors, "We didn't believe any of the appraisers, so we did it ourselves."

Random results occur in many cases where the jury selects some fortuitous circumstance on which to base its valuation. In one case, for example, where the spread was $8,000 to $15,000 and the verdict was $8,000, jurors indicated they would have gone lower if possible since they suspected, upon examination of the parties listed in the case caption, that there was some conspiracy to manipulate the sales price of the subject property. In another, on owner's testimony alone, $60,000 severance damage was awarded on 20 acres of dairy land with little or no impairment of access - the owner's use of subject property being as full and complete today as it was two years ago prior to condemnation of a flood control channel through his property. Another owner received $16,000 for damages to his commercial property four years ago and today, upon view of the property, it appears that he (through his appraiser) was correct at the time of trial in claiming $55,000.

Even in cases where the awards have proved to be near fair market value, an analysis of juror's rationale used in arriving at each decision would lead an appraiser to the opinion that the result was fortuitous.

A recent dicta by Justice Freedman in State of California v. Wherity, 275 A.C.A. 279 colorfully expresses this state of affairs (at p. 290):

> "In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers, and appraisers are willy-nilly players in a supercharged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor's profit is often less than the public's cost of maintaining the court during the days and weeks of trial...."

Apparently Article I Section 14 of our state Constitution requires (Weber v. Board of Supervisors of Santa Clara County [1881] 59 Cal. 265) that compensation shall be ascertained by a jury, though it is not entirely clear with subsequent (post 1881) amendments. This section could be interpreted in a number of ways to limit this requirement to appropriations by corporations not Municipal, County, State, etc., or to takings for reservoirs or rights of way only (see footnote 24, pg. 516 § 4.105 [3] Nichols on Eminent Domain.)

Due process does not forbid a jury trial, nor does it require a jury trial, [Nichols on Eminent Domain § 4.105 [1] discussing

effect of Seventh Amendment of the federal Constitution and corresponding provisions in state constitutions]. There is also, an excellent outline of judicial reasoning in justification of the denial of a right to jury trial in eminent domain in Section 4.105 [2] of Nichols.

A study of alternative non-jury approaches should be made - comparing the various "commissioner" systems used in other states

Even with the continued use of juries, it might be well to provide for a preliminary and informal determination of damages by some board or tribunal, other than a court. This could result [see Nichols § 26.53 pg. 346] in the acceptance of the award by the jury in the great majority of cases.

Very truly yours,

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